In the High Court of Punjab and Haryana at Chandigarh.

Civil Revision No.6315 of 2006.

Date of decision:3.5.2007.

Arun Kumar and another.

...Petitioners.

Versus

Kulwant Kaur and another.

...Respondents.

...

Coram: Hon'ble Mr. Justice S. N. Aggarwal.

...

Present: Mr.M.L.Sarin, Senior Advocate with Mr.Vivek Sood, Advocate for the petitioners.

Mr.Sachin Kapoor Advocate for the respondents.

...

Judgment.

S. N. Aggarwal, J.

One Jagatri Lal was the owner of house No.3220, Sector 37-D, Chandigarh. He was married to Padma Rani and from this wedlock, the petitioners were born. Said Padma Rani died on 26.9.1983. Thereafter, Jagatri Lal re-married with Kulwant Kaur,respondent No.1 on 26.9.1984 and from this wedlock Tarun Kumar,respondent No.2 was born. Said Jagatri Lal died on 21.3.2001. The petitioners were in possession of first and second floor of house

No.3220, Sector 37-D, Chandigrh while ground floor was in possession of the respondents. The petitioners and respondent Nos.1 and 2 are co-owners in the suit property to the extent of 1/4th share each.

The respondents filed a civil suit for partition by way of metes and bounds of house No.3220, Sector 37-D, Chandigarh. An application for interim stay was also filed by them seeking to restrain the petitioners from dispossessing the respondents from the suit property or interfering in their peaceful possession over the house in dispute. A prayer was also made to restrain the petitioners from alienating the suit property in any manner. It was also prayed that the petitioners be restrained from raising any construction.

The learned counsel for the petitioners appeared in the learned trial Court on 18.11.2005 and made a statement that the petitioners would not dispossess the respondents from the ground floor. The petitioners would not alienate the suit property in any manner and they would not raise any construction on the ground floor during the pendency of civil suit.

However, the said application for interim stay was decided on merits. It was accepted by the learned trial Court vide impugned order dated 10.2.2006 and the petitioners were restrained from raising any construction or changing the nature of the property or alienating the same or dispossessing the respondents from the suit property.

An appeal was filed by the petitioners. It was dismissed by the learned Lower Appellate Court vide order dated 22.7.2006.

Hence, the present petition.

The submission of learned counsel for the petitioners was that the suit itself was not maintainable. It was further submitted that the petitioners have already given an undertaking in writing that neither they would alienate the suit property nor they would dispossess the respondents from the ground floor during the pendency of civil suit. They have also given in writing that they would not raise any construction on the ground floor which is in possession of the respondents. Further submits that since the first and ground floors are in possession of the petitioners, they are entitled to make best use of the property. Reliance was placed on the judgment of the Hon'ble Division Bench of this Court reported as **Bachan Singh Versus Swaran Singh**, 2000(2) PLJ 143.

On the other hand, the submission of learned counsel for the respondents was that any construction raised by the petitioners on the first or second floor of the house in dispute would reduce its value and utility and the petitioners have no right to raise construction when they are not the exclusive owners of that property. Relies upon the judgment of the Hon'ble Supreme Court reported as **Maharwal Khewaji Trust (Regd.), Faridkot Versus Baldev Dass, 2**004(4) Recent Civil Reports, 760.

These submissions have been considered.

It is not disputed before me by the learned counsel for the parties that the respondents are in possession of ground floor of house

No.3220, Sector 37-D, Chandigarh while the petitioners are in possession of first and second floor of that house. It is not disputed that they are co-sharers and the suit for partition is pending between the parties. It was also not disputed that the undertaking given by the petitioners satisfies two reliefs prayed for by the respondents i.e. non-interference in their peaceful possession of the ground floor of the house in dispute and non-alienation of any part of the house in dispute. Only one relief remains for consideration of this Court i.e. not raising construction in the house in dispute.

It does not appeal to reason that the petitioners should be restrained from raising construction in that portion of the property which is in possession of the petitioners,even if it is necessary for making it more useful to them. In the judgment of the Hon'ble Division Bench of this Court in **Bachan Singh's** case (supra), the rights of co-sharers in possession have been discussed in detail and the following principles of law have been laid in para No.17:-

"17. On a consideration of the judicial pronouncements on the subject, we are of the opinion that:

(i) A co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster, prejudicial or adverse to the interest of co-owner out of possession.

(ii) Mere making of construction or improvement of, in the common property does not amount to ouster.

(iii) if by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as a co-owner."

Since the petitioners are in possession of first and second floor, therefore, it does not appeal to reason to stop them from raising minor construction thereon which may make the accommodation more suitable for them. This Court also fails to understand how the rights of the respondents would be affected when the respondents themselves have the right to raise construction in the portion of the property which is in their possession.

So far as the judgment reported as **Maharwal Khewaji Trust (Regd), Faridkot's** (supra) is concerned, it does not apply to the

facts of the present case because it is no where made out from the judgment if it was a case of co-sharer. If one of the parties was a trespasser on the suit property, he can be asked not to raise construction but the situation would be different if the person in possession was a co-sharer. A co-sharer enjoys certain rights which a trespasser does not. Therefore, the law laid down in **Maharwal Khewaji Trust (Regd), Faridkot's** case (supra) is not applicable to the facts of the present case. In these circumstances, the impugned orders passed by the learned trial Court and by learned Lower Appellate Court are set aside and the petition is accepted to the extent that the petitioners would be at liberty to raise construction on the first and second floor but this construction would be at their own risk and it would be subject to final decision in the civil suit filed by the petitioners against the respondents.

Disposed of.

May 3,2007. (S. N. Aggarwal)
Jaggi Judge